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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY ALLEN PHILLIPS,

Defendant and Appellant.

B289924

Los Angeles County
Super. Ct. No. MA073162

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Shannon Knight, Judge. Judgment affirmed as modified; order affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Pursuant to a plea agreement, defendant Ricky Allen Phillips was convicted of assaulting his wife with a deadly weapon, a vehicle. After imposing the negotiated sentence, the trial court issued a three-year protective order prohibiting defendant from contacting his wife. Neither defendant nor his counsel objected to the order.

On appeal, defendant contends he did not forfeit any challenge to the protective order and if forfeited, defense counsel was ineffective. Defendant also contends the evidence does not support the issuance of the order and the court erred by imposing an unauthorized \$500 fee. We modify the judgment by striking the unauthorized fee, affirm the judgment as modified, and affirm the protective order.

FACTS AND PROCEDURAL BACKGROUND

Because defendant entered a no contest plea before the preliminary hearing, the facts are taken from the probation report.

On February 5, 2018, sheriff's deputies responded to a report of an assault with a deadly weapon. When the deputies arrived at defendant's home, defendant's wife, C.P., said she and defendant had been married for 22 years and were having marital problems. Defendant became enraged after C.P. threw his clothes out of the house. He responded by throwing personal items belonging to C.P. out of a car window. As C.P. began to collect her items, defendant put the car into drive and accelerated towards her. C.P. jumped out of the path of the moving car and it crashed into the side of their home. Although C.P. was not injured, the car was totaled and the exterior of the home was

damaged. After the crash, defendant got out of the car and walked to the back door of the home. Because the door was locked, defendant broke the glass on the door to unlock it. He then went inside the home and sat down on the couch. Once he was inside the home, defendant told C.P.'s daughter to call 911.

Before defendant tried to hit C.P. with the car, he told her that voices told him to hurt her and kill himself. According to C.P.'s daughter, defendant had been making statements like "fuck you nigger bitch" and "you're going to have to kill me in order for me to leave this house" all day long. Defendant has a history of drug abuse.

Defendant gave the deputies a different version of events. He said he accidentally put the car into drive before crashing into the house. Once he saw the extent of the damage, he went inside the house to cool off. Although defendant did not remember breaking the glass on the door, he did not deny breaking it.

By felony complaint filed February 8, 2018, defendant was charged with assault with a deadly weapon, a vehicle, in violation of Penal Code¹ section 245, subdivision (a)(1). Defendant pled not guilty. On the same date, the trial court issued a criminal protective order under section 136.2 prohibiting defendant from having any contact with C.P., or from coming within 100 yards of C.P. Defendant was personally served with a copy of the order on February 8. The February 8 protective order provided that it expired on the date set forth in the order, if a date was specified; or if no date was listed, it expired three years from date of issuance. No expiration date was listed in the order.

¹ Unspecified statutory references are to the Penal Code.

On February 22, 2018, defendant accepted a plea agreement whereby he pled no contest to violating section 245, subdivision (a)(1), and admitted violating probation in a second case, with a specified term of imprisonment of two years for the assault count, plus a consecutive term of eight months in the second case. In exchange, the prosecutor agreed to terminate defendant's probation in the second case. The parties and the court did not mention the status of the February 8 protective order.

The court conducted a sentencing hearing on March 15, 2018. At the outset, the court noted it had read the plea transcript and the probation report. Per the probation report, C.P. wanted the February 8 protective order lifted so she could have contact with defendant. After sentencing defendant in conformity with the plea agreement, the court imposed various fines and fees including a \$500 domestic violence fee under section 1203.097, subdivision (a). At the end of the hearing, the court informed defendant that the prosecutor "is preparing a new protective order the court will sign." The court cautioned defendant to "read it carefully and that you understand it. Any violation could be filed against you as a new criminal offense. So if you have any questions about it, make sure you ask your attorney or the court." After defendant was personally served with a copy of the March 15 protective order, the court emphasized it expired in three years and prevented him from contacting C.P. Like the February 8 protective order, the March 15 protective order was issued under section 136.2. Neither defendant nor his counsel raised any objection to the March 15 order. In light of the new protective order, the court terminated the February 8 order.

DISCUSSION

1. The Challenge to the March 15 Protective Order

Section 136.2, subdivision (i)(1) provides that in all cases in which a defendant has been convicted of a crime that qualifies as a domestic violence crime, the trial court shall consider issuing a post-judgment protective order prohibiting contact with the victim for up to 10 years. (*People v. Therman* (2015) 236 Cal.App.4th 1276, 1279.) While the court is required to consider issuing a protective order, section 136.2 does not mandate the issuance of a protective order.

Here, there is no dispute that defendant was convicted of an offense that qualifies as a domestic violence crime, and that C.P. qualifies as a victim for purposes of a section 136.2, subdivision (i)(1) protective order. (See § 13700, subd. (b).) In addition, defendant concedes his counsel did not object to the three-year protective order, and that failure to object to a discretionary decision of the trial court results in forfeiture of the issue on appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 353, 356.)

Defendant claims, however, that counsel was ineffective for failing to object to the issuance or scope of the March 15 protective order. Claims of ineffectiveness must usually be “raised in a petition for writ of habeas corpus [citation], where relevant facts and circumstances not reflected in the record on appeal, such as counsel’s reasons for pursuing or not pursuing a particular trial strategy, can be brought to light to inform” the inquiry. (*People v. Snow* (2003) 30 Cal.4th 43, 111.) “There may be cases in which trial counsel’s ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too,

when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*.” (*Massaro v. United States* (2003) 538 U.S. 500, 508.) To prevail on the ineffectiveness claim, a defendant must demonstrate that counsel’s performance was objectively unreasonable and that, but for counsel’s errors, the result of the proceeding would have been different. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1124.)

Although the record sheds no light on why defense counsel failed to object to the issuance or scope of the three-year March 15 protective order, we reject defendant’s claim that counsel rendered ineffective assistance. As noted, at defendant’s arraignment on February 8, the court issued a protective order that was identical to the challenged March 15 order. Although the February order was superseded by the March order, the earlier order would have also been in effect until 2021.

More importantly, the underlying facts establish that a protective order was warranted. Defendant was convicted of a serious crime against his wife—he tried to hit her with his car. Although defendant was not successful because C.P. jumped out of the way, he crashed into their home and totaled the car. Then, when he found that the door to the house was locked, defendant broke the glass on the door to unlock it. And before he tried to hit C.P. with the car, defendant told her that voices told him to hurt her.

Given this record, including the court’s issuance of a prior three-year protective order, any objection by defense counsel to the issuance or scope of the March 15 order would have been futile. And it is not ineffective assistance of counsel to fail to raise futile objections. (*People v. Anderson* (2001) 25 Cal.4th 543, 587.) Because defendant’s challenge to the March 15 order is forfeited

and counsel was not ineffective, we need not address defendant's contention that the evidence does not support the issuance of the order or that the court erred by not specifying why it issued the order. We presume the court knew and applied the correct statutory and case law. (See *People v. Sangani* (1994) 22 Cal.App.4th 1120, 1138.)

2. The \$500 domestic violence fund fee is unauthorized.

“In passing sentence, the court has a duty to determine and impose the punishment prescribed by law.” (*People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1589.) An unauthorized sentence may be challenged “for the first time on appeal, and is subject to judicial correction whenever the error comes to the attention of the reviewing court.” (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) In response to our request for supplemental briefing, defendant contends, and the People properly concede, that the court erred in ordering defendant to pay a \$500 domestic violence fee under section 1203.097.

The \$500 domestic violence fee is to be imposed only when a defendant is “granted probation.” (§ 1203.097, subd. (a)(5)(A); see *People v. Killion* (2018) 24 Cal.App.5th 337, 341 [“section 1203.097, a rather lengthy statute, deals only with the initial imposition of probation at sentencing for domestic violence offenders”].) Here, because probation was denied and defendant was sentenced to state prison, the fee was unauthorized. We therefore modify the judgment to strike it. (See *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1520 [striking the fee where the defendant was sentenced to prison].)

DISPOSITION

We modify the judgment by striking the \$500 domestic violence fund fee (§ 1203.097, subd. (a)(5)(A)). As modified, the judgment is affirmed. Upon issuance of the remittitur, the court shall correct the minute order for March 15, 2018, to reflect deletion of this fee. The March 15, 2018, protective order is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

MURILLO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.